

likewise remove the opportunity for local authorities to restrict receive-only satellite antennas based on alleged RF radiation concerns, the only purported health concern even raised in this record. Specifically, the Commission's rule should be clear that there is no legitimate "health" objective that would justify precedence of a local or state law over federal regulations with respect to receive-only antennas. This can be readily accomplished by removing the word "health" from paragraphs (a)(1) and (a)(2) of the rule.

With respect to transmitting antennas, the Commission's rule states that nonfederal regulation of RF emissions is not preempted by its rule. SBCA urges the Commission to clarify that only "true" RF regulation is permitted, not regulations or bans on transmitting antennas masquerading as RF regulations. Without such a limitation, the Commission's preemption policy is in danger of being undermined by regulations that are hidden in the folds of the cloak of RF radiation regulation. To this end, SBCA proposes that the word "legitimate" be inserted before "nonfederal regulation" in the text of paragraph (a).

B. No Liability May Be Assessed For Actions To Install An Antenna Prior To A Final Commission Decision

As discussed above, satellite consumers will be hesitant to invest in this relatively new video programming service if they are uncertain whether installation of a satellite antenna will result in litigation and potential liability. If the federal interest in ensuring the availability of satellite services as a competitive communications service provider is to be preserved, satellite consumers must be able to install their satellite antennas when they want to start receiving satellite service, not after the local authority has fully adjudicated the validity of its antenna regulation. And, importantly, consumers must be able to do so without fear of penalty even if

they ultimately lose the battle -- unless the Commission has already ruled that the specific restrictive ordinance in question is legal.⁴⁴

The Commission's prohibition against any direct action against a consumer under paragraph (b)(1) of its rules, unless the locality first obtains a waiver, evidences that the Commission does not want to dissuade consumers from installing satellite antennas.⁴⁵ But, while the attempt is laudable it is neither broad enough nor specific enough to protect satellite consumers adequately and promote the federal interests. To achieve these goals, SBCA proposes that the end of paragraph (b)(1) be amended as follows:

No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this ~~presumption~~ **preemption until** unless the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), ~~or a final declaration from the Commission or a court of competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2).~~ **No liability may be assessed or action taken (including, but not limited to, the issuance of any directive or order requiring the disassembly of the satellite antenna) against a person for actions taken to install a satellite earth station antenna prior to a final Commission decision.**⁴⁶

C. Waivers May Be Granted Only If The Regulation Is Essential And No Broader Than Necessary

In order to effectively enforce its new preemption rule, the Commission should minimize the ways in which some local authorities might attempt to circumvent the rule. Specifically, the Commission should delineate clearly the scope of its waiver rule. The current

⁴⁴ SBCA does not intend that homeowners who install satellite antennas in direct defiance of a local regulation that has been upheld by the Commission should not be subject to liability. Once a locality has successfully tested its regulation with the Commission (by receiving a waiver), the local authority would be justified in vigorous enforcement of its law.

⁴⁵ 61 Fed. Reg. at 10898 (to be codified at 47 C.F.R. § 25.104(b)(1)).

⁴⁶ A similar policy must, of course, apply to HOA restrictions. Potential satellite consumers must be able to install DBS antennas without fear of liability and without threat from HOAs or local governmental authorities.

rule permits the Commission in its sole discretion, to grant a waiver if the applicant can demonstrate “local concerns of a highly specialized or unusual nature.”⁴⁷ SBCA suspects and fears that some local authorities, absent guidance from the Commission, will attempt to interpret “local concerns” in too broad a fashion. That result would disserve the public interest. The Commission would be inundated with inappropriate applications for waivers. And satellite consumers, as discussed above, would be forced either to oppose such applications if they want to preserve their federally ensured right to receive satellite signals or to surrender and subscribe to another type of service.

To avoid this result, the Commission should further define the parameters of its waiver rule by replacing “local concerns of a highly specialized or unusual nature” in the second sentence of paragraph (e) with the following:

(i) the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and (ii) the physical boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature.

The FCC should also clarify in the text of its order that in determining whether a regulation is “essential,” it will look to the regulation of not only satellite antennas, but also other similar structures. If an area does not regulate or restrict other structures, *e.g.*, mailboxes, sheds or basketball hoops, it is difficult to perceive how regulation or restriction of satellite antennas is “essential” to preserving or protecting the feature at issue.

This proposed language will have a number of beneficial effects. Potential satellite consumers will not bear the prospective burden of opposing a multitude of waiver requests and

⁴⁷ 61 Fed. Reg. at 10899 (to be codified at 47 C.F.R. § 25.104(e)).

thus will be better able to subscribe to satellite service if they so desire. This, in turn, will serve the federal interests discussed at length above. In addition, the proposed waiver rule will provide guidance to local authorities seeking to comply with the Commission's preemption policy. Further because the scope of allowable waivers is substantially more explicit, it will stem the tide of unmeritorious waiver applications to the Commission, thereby reducing the Commission's workload.

D. Specific Procedures For Declaratory Rulings And Waiver Petitions Should Be Adopted In This Rulemaking

The Commission acknowledges the need for a procedural framework for resolution of disputes by indicating that such procedures will be set forth in future Public Notices.⁴⁸

Commission guidance is needed sooner rather than later, however, and SBCA urges the Commission to set forth the procedural framework when it adopts an order in response to the Further Notice. Specifically, SBCA recommends that the Commission adopt the declaratory ruling procedure contained in section 1.2 of its rules and the waiver procedure contained in section 1.3, with the specific requirements that: (1) all requests for declaratory rulings and waiver applications shall be put on public notice with an opportunity for comment; (2) any such comments must be submitted within 30 days of the public notice and all replies must be submitted within 15 days thereafter; and (3) the Commission shall resolve such rulings expeditiously.

If the Commission adopts SBCA's proposed clarification to paragraph (b)(1) prohibiting the imposition of liability for actions taken prior to a final FCC ruling, then satellite

⁴⁸ *Id.* at 10899 (to be codified at 47 C.F.R. § 25.104(d)).

consumers need not fear reprisals from local authorities if they install antennas in the face of questionable local regulations that are ultimately held by the Commission to be valid. Under that scenario, therefore, a time limit for issuing declaratory rulings is unnecessary. If, however, the Commission declines to adopt the proposed clarification with respect to retroactive liability, then resolution must be reached substantially more quickly, because many satellite consumers will not install antennas until there is a final resolution. Accordingly, in that circumstance, the Commission should commit to ruling no later than 60 days after receiving a request for a declaratory ruling or waiver.

As the Commission is well aware, its initial rulings regarding requests for waivers and declaratory rulings will have tremendous precedent-setting value for future waiver and declaratory ruling requests. As this proceeding has clearly demonstrated, there are wide, varying and often conflicting views regarding the appropriateness of specific satellite antenna regulations. Thus, in order to make an informed decision on the propriety of any given regulation, the Commission should place on public notice all requests for waivers and declaratory rulings and should afford interested parties an opportunity to comment upon such requests. Only in this way can the Commission ensure that it will be fully informed regarding the competing interests involved in any determination and make a decision that can then be used as precedent in a myriad of other cases.

To establish these procedures, the Commission should replace the first sentence of paragraph (d) with the following language:

Petitions for declaratory rulings under paragraph (c) of this section and petitions for waivers filed under paragraph (e) of this section shall be placed on public notice for public comment. All comments shall be submitted to the Commission within thirty (30) days of the public

notice. All reply comments shall be submitted to the Commission within fifteen (15) days thereafter.

CONCLUSION

For all the reasons set forth above, including in particular the dictates and underlying policies of the 1996 Act, the Commission should take the following actions in response to its Further Notice: First, it should exercise its exclusive jurisdiction over all satellite antennas to adjudicate when its preemption rule applies. Second, the Commission should adopt a waiver-only approach with respect to the small satellite antennas governed by paragraph (b)(1) of its rule. Third, the Commission should adopt expeditiously its proposed rule adopting a *per se* preemption of private, nongovernmental restrictions that impair a consumer's ability to receive satellite signals.

The Commission should also clarify its existing preemption rule by: (1) clarifying that there can be no valid local regulation of receive-only antennas based on health concerns and that any such regulation of transmitting antennas must be limited to legitimate RF concerns; (2) clarifying that no liability will be assessed for actions to install satellite dishes prior to a final FCC adjudication; (3) delineating the scope of its waiver rule as specified herein, so that waivers are granted only if they are essential and no broader than necessary; and (4) specifying the procedures that the agency will use to implement its preemption rule, including placing all requests for declaratory rulings and waivers on public notice.

Respectfully submitted,



Diane S. Killory

Joan E. Neal

Joyce H. Jones

MORRISON & FOERSTER LLP

2000 Pennsylvania Avenue, N.W.

Suite 5500

Washington, D.C. 20006

(202) 887-1500

Counsel for the Satellite
Broadcasting and Communications
Association of America

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A

SBCA Proposed Rule

- (a) Any state or local zoning, land-use, building, or similar regulation that materially limits transmission or reception by satellite earth station antennas, or imposes more than minimal costs on users of such antennas, is preempted unless the promulgating authority can demonstrate that such regulation is reasonable, except that **legitimate** nonfederal regulation of radio frequency emissions is not preempted by this rule. For purposes of this paragraph (a), reasonable means that the local regulation:

- (1) has a clearly defined ~~health~~, safety or aesthetic objective that is stated in the text of the regulation itself; and
- (2) furthers the stated ~~health~~, safety or aesthetic objective without unnecessarily burdening the federal interests in ensuring access to satellite services and in promoting fair and effective competition among competing communications service providers.

- (b) Any state or local zoning, land-use, building, or similar regulation that affects the installation, maintenance, or use of:

- (1) a satellite earth station antenna that is two meters or less in diameter and is located or proposed to be located in any area where commercial or industrial uses are generally permitted by nonfederal land-use regulation; or
- (2) a satellite earth station antenna that is one meter or less in a diameter in any area, regardless of land use or zoning category

~~shall be presumed unreasonable and is therefore~~ is preempted subject to paragraph

~~(b)(2).~~ No civil, criminal, administrative, or other legal action of any kind shall be taken to enforce any regulation covered by this ~~presumption~~ **preemption until** ~~unless~~ the promulgating authority has obtained a waiver from the Commission pursuant to paragraph (e), ~~or a final declaration from the Commission or a court of~~

~~competent jurisdiction that the presumption has been rebutted pursuant to subparagraph (b)(2). No liability may be assessed or action taken (including, but not limited to, the issuance of any directive or order requiring the disassembly of the satellite antenna) against a person for actions taken to install a satellite earth station antenna prior to a final Commission decision.~~

~~(b)(2) Any presumption arising from subparagraph (b)(1) of this section may be rebutted upon a showing that the regulation in question:~~

~~(A) — is necessary to accomplish a clearly defined health or safety objective that is stated in the text of the regulation itself;~~

~~(B) — is no more burdensome to satellite users than is necessary to achieve the health or safety objective; and~~

~~(C) — is specifically applicable on its face to antennas of the class described in paragraph (b)(1).~~

(c) Any person aggrieved by the application or potential application of a state or local zoning or other regulation in violation of paragraph (a) of this section may, after exhausting all nonfederal administrative remedies, file a petition with the Commission requesting a declaration that the state or local regulation in question is preempted by this section. Nonfederal administrative remedies, which do not include judicial appeals of administrative determinations, shall be deemed exhausted when

(1) the petitioner's application for a permit or other authorization required by the state or local authority has been denied and any administrative appeal and variance procedure has been exhausted;

(2) the petitioner's application for a permit or other authorization required by the state or local authority has been on file for ninety days without final action;

- (3) the petitioner has received a permit or other authorization required by the state or local authority that is conditioned upon the petitioner's expenditure of a sum of money, including costs required to screen, pole-mount, or otherwise specially install the antenna, greater than the aggregate purchase or total lease cost of the equipment as normally installed; or
 - (4) a state or local authority has notified the petitioner of impending civil or criminal action in a court of law and there are no more nonfederal administrative steps to be taken.
- (d) ~~Procedures regarding filing of petitions requesting declaratory rulings and other related pleadings will be set forth in subsequent Public Notices.~~ **Petitions for declaratory rulings under paragraph (c) of this section and petitions for waivers filed under paragraph (e) of this section shall be placed on public notice for public comment. All comments shall be submitted to the Commission within thirty (30) days of the public notice. All reply comments shall be submitted to the Commission within fifteen (15) days thereafter. All allegations of fact contained in petitions and related pleadings must be supported by affidavit of a person or persons with personal knowledge thereof.**
- (e) Any state or local authority that wishes to maintain and enforce zoning or other regulations inconsistent with this section may apply to the Commission for a full or partial waiver of this section. Such waivers may be granted by the Commission in its sole discretion, upon a showing by the applicant that **(i) the regulation is essential for preserving or protecting a highly specialized or unique feature of a particular location and (ii) the physical boundaries of the particular location and the scope of the regulation are no broader than necessary to preserve or protect the highly specialized or unique feature** ~~local concerns of a highly specialized or unusual nature.~~ No application for waiver shall be considered unless it specifically sets forth the particular regulation for which waiver is sought. Waivers granted in accordance with this section shall not apply to later-enacted or

amended regulations by the local authority unless the Commission expressly orders otherwise.

- (f) No restrictive covenant, encumbrance, homeowners' association rule, or other nongovernmental restriction shall be enforceable to the extent that it impairs a viewer's ability to receive video programming services over a satellite antenna less than one meter in diameter.**
- (g) The sole forum for adjudicating any matters within this section shall be the Commission.**

B

Declaration of Greg E. Mathieson

I, Greg E. Mathieson, declare as follows:

1. I own a home in Virginia Run, a planned development in Centreville, Virginia. I have owned my home since 1988. In December 1994, I decided to install an 18-inch direct-to-home satellite on my property.
2. As a member of the news media, I have a strong interest in following the news and as a result have installed a bank of television sets in my living room, as well as various other rooms in my house, so that I can simultaneously view all of the networks and other news programs. At the time I decided to install an 18-inch satellite dish, I was using cable service to access these news programs, but had been experiencing problems with the picture quality provided by my cable service and had found cable service to be unreliable, particularly in bad weather. (For the reasons explained below, I still must rely on cable service, with its attendant problems.) I felt (and continue to believe) that satellite service would be a good solution to these problems.
3. On January 3, 1995, I attended the meeting of the Architecture Review Board ("ARB") of Virginia Run Community Association ("VRCA"), the homeowners' association for my development, to seek approval to install an 18-inch direct-to-home satellite dish on my home. I also submitted a written application to the ARB. At the ARB meeting, I explained my reasons for wanting satellite services. I also argued that VRCA does not prohibit the large green cable pedestals that facilitate cable service and stand, clearly visible, alongside the curbs of my neighbors' homes. Therefore, I argued

that VRCA should not prohibit my proposed 18-inch dish that would be considerably less visible.

4. By letter of January 31, 1995, the ARB denied my application. The ARB informed me that exterior satellite dishes are prohibited by the "Architecture and Design Guidelines" for Virginia Run. The letter also stated that I could amend my application or appeal the decision to the ARB, in writing, within 10 days.

5. In response to the ARB's letter of denial, I sent a letter to the ARB requesting an appeal and the right to present the appeal in person before the ARB.

6. I presented my appeal to the ARB at the ARB's committee meeting. In addition to my previous arguments, I also presented the ARB with a number of court decisions preempting local ordinances that prohibited satellite antennas.

7. On April 6, 1995, the ARB informed me by letter that my appeal had been denied. The letter cited Architectural and Design Guideline No. 2.0: "Antennas. Exterior antennas, satellite dishes or similar devices are prohibited." I was again invited to amend my application or appeal the decision within ten days.

8. On June 22, 1995, I again requested the right to appeal the ARB's decision in person. This time my appeal was directed to the Board of Trustees of VRCA. My presentation to the Board of Trustees included a presentation from a salesperson at Sears who explained the installation process for 18-inch dishes and brought along an 18-inch dish for the Board to view. In addition, one of my neighbors, who works for a satellite dish manufacturer, attended the meeting on my behalf to explain the need for an exterior

line of sight in order to obtain satellite service. The Board of Trustees denied my application.

9. Subsequently, I learned that the recently enacted Telecommunications Act of 1996 ("1996 Act") contains a provision regarding preemption of private restrictions, such as homeowners' association ("HOA") rules, on direct broadcasting satellite ("DBS") service antennas. As a result, I checked the web site of the Federal Communications Commission on the Internet and found of a copy of the specific provision, section 207 of the 1996 Act, as well as an FCC press release dated February 29, 1996, regarding the FCC's new preemption rule and a proposed rule preempting HOA restrictions on DBS satellite antennas.

10. On March 29, 1996, I submitted a new application to install an 18-inch satellite antenna and, on April 2, 1996, attended the ARB's meeting to discuss my new application. I presented the ARB with copies of section 207 of the 1996 Act as well as the FCC's press release regarding its new preemption rule and proposed rule regarding preemption of HOA restrictions. The ARB still indicated that it was inclined to reject my application, although it did indicate that it would submit these materials to its attorney.

11. Despite the language of section 207 of the 1996 Act and the FCC's proposed rule, in informal meetings, members of the ARB continued to raise aesthetic objections to my proposed 18-inch dish. In addition, members of the ARB informally expressed their fears that if the ARB allowed residents to install satellite antennas on their property, if and when foliage on surrounding common property grows and potentially blocks the line of sight for such antennas, residents might ask VRCA to remove that

foliage. Finally, certain members of the Board of Trustees (who happen to work in other sectors of the telecommunications field) expressed the opinion that the video services I was looking for through satellite service would eventually be available through my telephone lines. Thus, in their opinion, I do not need to subscribe to satellite services.

12. Throughout this process, I have been told by members of VRCA that I should be patient because VRCA might decide to amend its rules to permit certain satellite antennas. To this end, VRCA conducted a survey of the approximately 1,500 homeowners in Virginia Run asking, among other things, whether the homeowners were in favor of permitting 18-inch satellite dishes to be installed on their property. Of the 500 responses received, approximately 80 percent of the homeowners were in favor of permitting 18-inch dishes. Despite this overwhelming approval response, VRCA now intends to hold a public hearing to decide whether to modify its architectural guidelines with respect to 18-inch dishes. It is becoming increasingly unlikely that a new rule permitting 18-inch dishes will be adopted anytime soon.

13. I have yet to install my 18-inch satellite dish because I could be subject to substantial fines. Under VRCA's recently amended rules, it may fine homeowners \$10 per day for violation of the Association's rules until the violation is corrected.

Dated: April 12 1996



Greg L. Mathieson